potential return from that investment.[50] Indeed, as the D.C. Circuit correctly pointed out, even "prices that *seem* to equate to cost have this effect."[51] "Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."[52]

Although the Supreme Court rightly noted that both CLECs and ILECs have continued to invest in facilities even after the advent of the unbundling and TELRIC regime,[53] the presence of such investment does not indicate that unbundling has had no disincentive effect on facilities investment. As the D.C. Circuit observed, "the existence of investment of a specified level tells us little or nothing about incentive effects. The question is how such investment compares with what would have occurred in the absence of the prospect of unbundling."[54] Basic economics and common sense provide good reason to believe that requiring unbundling — at least in cases where competitors have reasonable alternatives — suppresses the amount of investment that otherwise would have occurred.

Thus, to promote efficient investment in facilities by *all* carriers, the Commission must limit unbundling obligations to those ILEC network elements that CLECs cannot realistically obtain from alternative sources, and the Commission must ensure that its UNE pricing rules do

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50/ In this regard, Corning has submitted a study showing that significantly greater ILEC investment in fiber to the home could be economically justified if unbundling of such facilities is not required. *See* Corning Comments, Study at 11.

51/ *USTA*, 290 F.3d at 424.

52/ *Id.*

53/ *Verizon*, 122 S. Ct. at 1675.

54/ *USTA*, 290 F.3d at 425.

not deprive ILECs of the ability to reap the rewards of their successful innovations and investments.

C. The Commission Must Consider Evidence of Intermodal Competition.

The D.C. Circuit recognized that the Commission's analysis cannot, as some commenters have advocated, ignore or discount the existence of intermodal competition.[55/] Intermodal competition is far more beneficial to consumers than *intra*modal competition that is based on the use of the incumbent LECs' facilities. Intermodal competition is both driven by and encourages differences in network capabilities, functionalities, and costs, thereby increasing consumer choice. Intramodal competition, especially when UNE-based, is driven by salesmanship, and produces little or no innovation.[56/] For the same reasons that consumers enjoy far more benefits from a market that offers Fords and Chevrolets than a market comprised solely of "competing" Ford dealerships, consumers will benefit more from intermodal network competition in telecommunications.

That intermodal competitors of the incumbent LECs do not have to provide CLECs unbundled access to their networks does not require the Commission to reach a different conclusion, as some parties contend.[57/] First, the existence of intermodal competition demonstrates that it is possible to offer service without relying on the ILEC's network. Where intermodal competition exists, there is "no reason to think [that requiring unbundling] would bring on a significant enhancement of competition."[58/] Thus, even if a particular competitor

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55/ *See USTA*, 290 F.3d at 428-29.

56/ *See, e.g.*, Haring & Shooshan at 18-23 (describing the competitive benefits of various intermodal alternatives to ILEC services and facilities).

57/ *See, e.g.*, ALTS Comments at 39-40.

58/ *USTA*, 290 F.3d at 429.

might prefer a business plan that requires relying on the ILEC's network to offer services, the existence of intermodal competition through non-ILEC facilities demonstrates that access to ILEC facilities is not a prerequisite to competition. For this reason, the Supreme Court and D.C. Circuit made clear in overturning the *Local Competition Order*, *UNE Remand Order*, and *Line Sharing Order* that the decision whether to unbundle an element simply cannot disregard the existence of facilities that allow provision of service without reliance on the ILEC's plant.[59/] Second, to the extent that facilities-based providers other than incumbent LECs do not make their facilities available to non facilities-based CLECs, the deregulatory solution is not to maintain, much less extend, the existing unbundling regulations, as urged by CLECs, but to reduce or eliminate them. Alternative facilities-based providers have no incentive to compete for wholesale business with ILEC facilities that must be offered at artificial prices set by regulators. The removal of unbundling requirements would allow market forces to replace regulatory impositions and create more efficient incentives for all carriers to lease their facilities to CLECs at competitive rates and prices.

Thus, the presence of intermodal competition already provides the competitive and consumer benefits that are the underlying goals of the Act. Indeed, in the context of cable, Congress has concluded that even one, partially built-out competitor offers sufficient "effective competition" to permit complete deregulation of cable rates[60/] — something that AT&T's cable subsidiaries have repeatedly trumpeted in pointing to fledgling ILEC cable entry to support

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59/ *Iowa Utils. Bd.*, 525 U.S. at 392; *USTA*, 290 F.3d at 428-29.

60/ 47 U.S.C. § 543(l)(1)(B)(ii) (a 15% market share by a multichannel video programming distributor other than the largest such distributor in a market qualifies as "effective competition").

deregulation of the incumbent cable operator.[61] By the same logic, the development of intermodal competition over the long term should lead to the elimination of all unbundling requirements in many markets altogether. For example, as cable telephony becomes more widely available and wireless phones become virtual substitutes for wireline service, ILECs will eventually lose any residual pricing power based on its status as a regulated utility even in subsidized retail markets. Once this happens, unbundling would no longer enhance competition; rather, it would only handicap ILECs in markets where they face vigorous competition for retail customers, and stifle the potential for competition for wholesale customers. Where that is this case, as the D.C. Circuit recognized, the Act does not justify continuing "to inflict on the economy" the harms associated with unbundling requirements.[62]

D. Additional Factors Should Not Be Used to Require Unbundling Absent a Failure to Demonstrate "Impairment."

The statutory language directing the Commission to consider the necessary and impair standard "at a minimum"[63] permits the Commission to determine, based on other factors, that an element should not be unbundled even if competitors would be impaired without mandatory access to that element. As discussed above, the Commission particularly should look to the

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61/ For example, the City of Boston recently challenged the Commission's determination that AT&T's subsidiary, Cablevision of Boston, Inc., was subject to "effective competition," from Residential Communications Network of Massachusetts, Inc. (RCN), a LEC. The City noted that "RCN [had] activated parts of its [multichannel video] system in only four out of sixteen neighborhoods in Boston" and was "unlikely to complete its build-out in the near future." Petition to Stay Determination of Effective Competition, *Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, CSR 5048-E (filed Aug. 21, 2001). AT&T nevertheless argued that "competition provided by *any* LEC," even one that serves only a small portion of the franchise area, "is all that is required" to establish effective competition. Opposition of AT&T to the City of Boston's Petition for Stay, *Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, CSR 5048-E, at 6 (filed Aug. 28, 2001).

62/ *USTA*, 290 F.3d at 429.

63/ 47 U.S.C. § 251(d)(2).

effects of unbundling on facilities investment and the presence of intermodal competition. The Commission should not, however, use the "at a minimum" language as an excuse to *subvert* the impairment test. As the D.C. Circuit observed, Congress "made 'impairment' the touchstone"[64] for requiring unbundled access. Thus, the court rejected every reason offered by the Commission in the *UNE Remand Order* as part of or in addition to the impairment analysis to support the imposition of an unbundled access requirement. Specifically, the court rejected reliance on factors such as the goal of rapidly introducing competition to justify greater unbundling as being little more than "the expression of [the] belief that in this area more unbundling is better."[65] Yet CLECs once again urge the Commission to consider additional factors "to permit further unbundling [of a network element], even if competitors are not impaired" without access to the element.[66] Their arguments, and the factors to which they point, boil down once again to the simple belief, rejected by the court, "in the beneficence of the widest unbundling possible."[67] If the Commission has already determined that CLECs would not be impaired without access to a UNE, it has necessarily found that alternative facilities are an available and feasible means of entry. In those circumstances, to nevertheless require

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64/ *USTA*, 290 F.3d at 425.

65/ *Id.*

66/ WorldCom Comments at 52. The five factors enumerated by the Commission in the *UNE Remand Order* and supported by WorldCom are: (1) rapid introduction of competition in all markets; (2) promotion of facilities-based competition, investment, and innovation; (3) reduced regulation; (4) certainty in the market; and (5) administrative practicality. *UNE Remand Order*, 15 FCC Rcd at 3747-50 ¶¶ 107-16.

67/ *USTA*, 290 F.3d at 425.

unbundling would defeat the Supreme Court's mandate that the Commission "giv[e] some substance to the 'necessary' and 'impair' requirements."[68/]

1. The Commission Should Reject Calls to Unbundle Elements Simply To Ensure the Availability of UNE-P.

Some commenters go so far as to argue that the Commission should keep all network elements on the national list simply to ensure the availability of the UNE-P as a transitional means to serve mass-market customers.[69/] These commenters assert that CLECs need access to UNEs to develop a sufficient customer base to justify investment in new facilities, and that this need "trumps" an element-specific showing that CLECs are not impaired without access to a particular element (such as switches).[70/] The CLECs' claim founders on at least three levels.

First, the CLECs' argument fails at the threshold because it is based on an unsupported myth: contrary to their contention, CLECs are *not* using UNE-Ps simply as a transitional vehicle to their own facilities-based service. As explained in the *UNE Fact Report*, CLECs that use

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68/ *Iowa Utils. Bd.*, 525 U.S. at 392; *see also USTA*, 290 F.3d at 426 ("[T]he Court read the [1996 Act] as requiring a more nuanced concept of impairment than is reflected in findings such as the Commission's . . . .").

69/ *See, e.g.*, AT&T Comments at 218-31; WorldCom Comments at 26-27, 81-82; Z-Tel Comments at 28-50.

70/ For example, the Pennsylvania Office of Consumer Advocate et al. argue that "being able to provide local telephone service to residential customers through the UNE-P enables CLECs to develop the necessary market share, particularly in the residential market," even while acknowledging that CLECs have deployed switches widely and that such deployment "may further modernize infrastructure and possibly . . . provide a more reliable means of local telephone competition." Pennsylvania Office of Consumer Advocate, et al. Comments at 12; *see also* WorldCom Comments at 26 (arguing that CLECs require access to UNE-P because, "until [they] build[] a substantial customer base, . . . CLEC[s] using [their] own switches and transport cannot achieve all of the scale economies the ILEC[s] enjoy[]."); ALTS Comments at 18-20 (arguing that "[n]ew entrants use UNEs as a market-entry strategy" because they "allow[] competitors to enter markets without incurring the massive up-front capital expenditures of replicating the ILEC network" while their customer bases remain small).

UNE-P have not converted residential customers to their own switches, even in locations such as New York where they already have deployed their own switches to serve business customers.[71] WorldCom and AT&T readily admit that they have no plans to convert their UNE-P customers to their own switches, even after they have acquired a large customer base.[72] Qwest's experience confirms this: Despite the fact that UNE-P demand in Qwest's in-region service area *increased* dramatically from December 2000 to December 2001 (growing from approximately 372,000 to more than 461,000), the total number of hot cuts ordered by CLECs has generally *decreased* in the past year and has been on the order of 4,000 to 6,000 hot cuts per month in recent months. Moreover, though AT&T claims that UNE-P customers can be migrated to CLEC switches efficiently using managed conversions,[73] Qwest is not aware of a single request by AT&T for such a managed conversion in Qwest's in-region service area. Ultimately, this experience demonstrates that the availability of UNE-P, far from providing a launching point for facilities-based competition as CLECs suggest, actually depresses facilities investment.

71/ *UNE Fact Report 2002* II-17 to II-20 (Apr. 2002) (submitted by BellSouth, SBC, Qwest, and Verizon) (submitted as Attachment B to Qwest's initial comments) ("*UNE Fact Report*").

72/ WorldCom submitted testimony to the Commission stating that UNE-P "is the only service-delivery option that WorldCom currently views as even potentially viable." Declaration of Vijetha Huffman ¶ 5, *attached to* Comments of WorldCom, Inc., *Application of Verizon New Jersey, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347 (filed Jan. 14, 2002). AT&T similarly has acknowledged to the Commission that "it has not pursued a strategy of converting platform customers to its own facilities 'to provide basic local residential service to customers anywhere in the country.'" *UNE Fact Report* at II-18, n.56 (quoting Supplemental Declaration of Michael Lieberman on Behalf of AT&T Corp. ¶ 20, *attached to* Ex Parte Letter of Peter Kiesler, Sidley Austin Brown & Wood (representing AT&T), to William F. Caton, CC Docket No. 01-324 (Feb. 8, 2002)).

73/ AT&T Comments at 221.

Professor Willig's attempt to demonstrate empirically that increased availability of UNE-P correlates with higher levels of facilities investment and competitive entry[74] is equally unavailing. As explained in the analysis by John Haring and his colleagues submitted with these comments, Professor Willig's study of ILEC investment suffers from several fundamental flaws.[75] Perhaps the most significant is that Professor Willig attempts to use 2001 variables (specifically, UNE-P prices and the number of CLECs competing in each state in 2001) to explain ILEC investment levels from five years *earlier*. In order to conclude that regulatory and market conditions in 2001 influenced decisions made as early as 1996, as Professor Willig does, one would have to believe that those responsible for ILEC investment decisions in 1996 knew the UNE-P prices that would be set and the number of CLECs that would be participating in the market in 2001.[76] But this is obviously absurd. Likewise, Professor Willig's use of the number of CLECs as a measure of the level of competition is misguided. "[A] few large CLECs could be far more consequential than many small ones," depending on factors such as the number of customers served by each CLEC and the capacity of each CLEC to serve additional customers with existing facilities and resources.[77] The use of such a poor measure of the level of competition further undermines the validity of his conclusions.

Dr. Haring and his colleagues were able to develop a more reliable model using alternative data sources that corrects for these flaws and disproves Professor Willig's conclusions concerning the relationship between UNE prices and ILEC investment. Their principal finding

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74/ *See id.*, Declaration of Robert D. Willig at 40-64.

75/ John Haring et al., *UNE Prices and Telecommunications Investment* 3-4 (July 17, 2002) (submitted as Attachment B to these comments) ("Haring et al.").

76/ *Id.* at 4-5.

77/ *Id.* at 5.

is that UNE loop price is positively correlated with ILEC investment — *i.e.*, as UNE loop prices increase, so does ILEC investment.[78/] They also discuss several models of CLEC entry that are far more reliable than Professor Willig's and do not support his conclusion that low UNE prices encourage CLEC entry. To the contrary, these studies have found that low UNE prices "do *not* promote competition, especially facilities-based competition."[79/]

Second, the CLECs' argument ignores the statutory test. What the CLECs are seeking is to continue indefinitely the unbundling requirements unless and until each individual CLEC decides it no longer has any use for them as a transitional mechanism to "develop a customer base." But if the Commission finds that CLECs are capable of self-provisioning a certain network element or obtaining a substitute for that element from non-ILEC sources, that ends the statutory inquiry with respect to that element. Any other result would strip away the limiting principles that the Supreme Court found to be embodied in the statute and eliminate the potential for increased facilities-based competition. Thus, to assert that the facility in question is needed as part of a transitional mechanism to obtain a customer base is simply to quarrel with the finding that CLECs are not impaired without access to the facility.

Third, the CLECs' assertion also ignores the availability of resale as a transitional mechanism to obtain a customer base. A CLEC that feels the need to obtain a "critical mass" of customers before investing in facilities can do so using resale. UNE-P adds no more "competition" than resale because, as noted above, true competition lies in the alternatives offered by *unshared* facilities, and UNE-P, by definition, involves only shared facilities. Although the Commission assigned "little weight" to the availability of resale in the context of

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78/ *Id.* at 12-13.

79/ *Id.* at 17.

determining whether to unbundle *individual* elements, it did so based on the concern that ILECs could then avoid many of their unbundling obligations merely by offering unbundled elements to end users as retail services.[80/] But that risk is entirely inapposite in the context of UNE-P: UNE-P is by definition already the functional equivalent of finished retail local phone service that Congress has *required* ILECs to provide for resale. As a result, leaving a network element such as circuit switching on the national list solely to permit CLECs to obtain UNE-P would provide no competitive benefits and would eviscerate the "necessary and impair" standard prescribed by Congress.

2. The Commission Should Not Use its Unbundling Rules to Protect Individual CLECs.

Several commenters advocate proposals that would have the effect of protecting individual CLECs and/or particular business models. Most notably, ALTS supports allowing individual carriers or classes of carriers to make particularized showings of impairment to justify targeted unbundling of additional network elements.[81/] Proposals to discount evidence of intermodal competition because such competition may not aid intramodal competitors similarly are based on the premise that the Act is designed to protect particular competitors or business models. But, as the D.C. Circuit recognized, that is not the case — the Act is designed to promote competition, not individual competitors that choose a particular entry strategy.

The impairment test cannot be based on whether a particular CLEC or business plan can succeed without access to a particular ILEC network element. As the Commission observed in the *UNE Remand Order*, "[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove

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80/ *UNE Remand Order*, 15 FCC Rcd at 3732 ¶ 67.

81/ ALTS Comments at 37-38. *See also* Z-Tel Comments at 24 (arguing that the Commission must "focus . . . on the needs of requesting carriers rather than on the level of competition for a particular service").

elements from the [national] list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers."[82/] Entertaining requests to *add* elements to the list for particular CLECs would have the same effect. The D.C. Circuit's decision makes clear that the goal of the Act is to protect and facilitate competition, not individual competitors or business plans.[83/] So long as there is a meaningful opportunity for competition to develop without providing CLECs with access to a particular ILEC network element, the fact that an individual CLEC may need access to that element to pursue its unique business plan does not justify a finding of impairment. Thus, ALTS' suggestion that the Commission should "permit individual showings of impairment [by CLECs] on a case-by-case basis"[84/] would be contrary to the goals of the Act, and would be extraordinarily impractical and inefficient. Indeed, this approach would be a recipe for perpetual unbundling requirements, since there will always be a particular new entrant or undercapitalized carrier that could claim it would be better off, at least in the short term, with access to UNEs. But that is not the statutory test.

E. Granularity of Unbundling Rules

A number of CLECs have argued that the Commission should not modify its existing analytical framework to make it more granular, and instead support maintaining the current

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82/ *UNE Remand Order*, 15 FCC Rcd at 3765 ¶ 150.

83/ This can be seen in the court's finding that the *Line Sharing Order* placed too much emphasis on the services that intramodal competitors sought to offer and failed to give adequate consideration to the presence of intermodal competition. The court explained that "nothing in the Act appears [to give] a license to the Commission to inflict on the economy the sort of costs [associated with unbundling] . . . under conditions where it had no reason to think doing so would bring on a *significant enhancement of competition*." *USTA*, 290 F.3d at 429 (emphasis added).

84/ ALTS Comments at 37.

national list of UNEs.[85] The D.C. Circuit has now firmly rejected this approach, recognizing that it results in making UNEs available in markets "where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have been the object of Congress's concern."[86] Consequently, in appropriate circumstances, more granular rules may be the logical outcome of an impairment analysis and/or necessary to further the goals of the Act. For example, a market-specific analysis may be necessary to eliminate unbundling obligations in certain markets where it would be feasible for CLECs to obtain network elements from a non-ILEC source, and a service-specific analysis may be required to prevent regulatory arbitrage. At the same time, it is appropriate to eliminate the unbundling requirement for a particular element on a national basis if in fact the Commission's analysis indicates that unbundling of that element is not needed in any market because, for example, it has been, or reasonably could be, ubiquitously deployed.

The uncertainty, complexity, and litigation that could be created by a more granular approach can and should be avoided by the adoption of objective, bright-line rules that can easily be applied and that provide predictability for all carriers.[87] For example, as discussed in more detail below, the increased deployment of CLEC transport facilities in certain markets justifies

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85/ *See, e.g.*, AT&T Comments at 97-100 (arguing that proposals for increased granularity are "exceptionally poor proxies for the factors that determine 'impairment' . . . for individual network elements."); Covad Comments at 79-81, 84-88 (arguing against more granular analysis); WorldCom Comments at 51 ("Continuing to apply the current standard . . . would lead to greater certainty and would minimize the likelihood of further appeals and challenges.).

86/ *USTA*, 290 F.3d at 422.

87/ On this point, CLECs, ILECs, and other commenters that support some form of granularity generally agree. *See, e.g.*, WorldCom Comments at 63 ("impairment analysis must yield bright-line unbundling rules" that remove uncertainty); Covad Comments at 84-85 (urging the Commission to make sure that its rules are clear); SBC Comments at 60, 63-65 (same); California PUC Comments at 14 (same).

geographic specificity in the unbundling analysis for the dedicated transport network element. But rather than creating an entirely new or subjective test to identify the markets in which CLECs have alternatives to ILECs' networks, the Commission should use the familiar and easy-to-administer pricing flexibility test.

F. Authority of States Under Federal or State Law

Although many commenters have urged the Commission to let the states assume significant responsibility for determining which UNEs should be unbundled,[88] that approach is untenable on both legal and policy grounds. As discussed below, Congress assigned to the Commission, not the states, the task of "determining what network elements should be made available."[89] To discharge that responsibility, the Commission must make finely tuned determinations about the circumstances in which it would — and *would not* — be appropriate to allow CLECs to share an ILEC's network facilities in lieu of obtaining facilities of their own. The ensuing UNE list sets both a ceiling and a floor. Viewing it only as a floor, and permitting the states to add UNEs to that list, either as a matter of federal or state law, would "substantially prevent implementation of the requirements of [section 251] and the purposes of [the Act]."[90] That approach could be lawful only if Congress had decided as a general matter that "more unbundling is better" — but, as the D.C. Circuit recently confirmed, Congress decided no such

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88/ *See, e.g.* AT&T Comments at 241-51 (arguing that state commissions should have primary role in determining when UNEs can be "de-listed"); ALTS Comments at 129-32 (arguing that the Commission should continue to allow states to add to the national UNE list); California PUC Comments at 22-24 (same).

89/ 47 U.S.C. § 251(d)(2).

90/ *Id.* § 251(d)(3)(C).

thing.[91] As a result, preserving a substantial role for state discretion in this area would be inimical to the "national policy framework" created and contemplated by the 1996 Act.[92]

As an initial matter, the Commission should make clear that states cannot add unbundling requirements under either federal or state law for elements the Commission itself has considered but declined to unbundle. When the Commission properly executes its own role under section 251(d)(2), it does not merely create a minimum set of unbundling rights. It also necessarily makes a judgment about the extent to which *further* unbundling would distort the competitive marketplace by depriving ILECs and CLECs alike of appropriate investment incentives. Permitting the states to supplement the UNE list (but not subtract from it) would necessarily produce precisely the market distortion that the Commission's decision *declining* to require unbundling sought to avoid. Thus, for example, in declining to require unbundled packet switching in the *UNE Remand Order*, the Commission concluded that such a requirement would be contrary to "the Act's goal of encouraging facilities-based investment and innovation" and potentially "stifle burgeoning competition in the advanced service market."[93] A state-imposed requirement that packet switching nevertheless be unbundled accordingly would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and should be preempted.[94]

91/ *USTA*, 290 F.3d at 425.

92/ *See UNE Remand Order*, 15 FCC Rcd at 3751 ¶ 117. Qwest does *not* argue that the Commission lacks statutory authority to identify objective, fact-specific circumstances in which unbundling would or would not be appropriate and then delegate to the state commissions the task of determining whether those circumstances are present in particular markets.

93/ *Id.* at 3839-40 ¶¶ 314-317.

94/ *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 287 (1987). Even where a state law does not plainly contradict a federal law or regulation, preemption is routinely found when the state law or regulation would undermine the "flexibility" that is "a critical component

Contrary to the views of some commenters, section 251(d)(3) does not carve out a safe harbor for such market-distorting state-level regulation, because, by its terms, that provision excludes state action that would "substantially prevent implementation of the requirements of [section 251] and the purposes of [the Act]."[95/] Indeed, the Commission recognized as much in the *UNE Remand Order* when it explained that section 251(d)(3) does not permit states to add additional unbundling obligations that do not "meet the requirements of section 251 *and the national policy framework instituted in this Order.*"[96/] States nevertheless have attempted to impose unbundling requirements as a matter of state law for elements the Commission determined should not be unbundled.[97/] To make clear that such actions are impermissible, the Commission should exercise its preemption authority to foreclose state unbundling requirements for any UNE that this Commission has specifically decided not to unbundle under its own analysis.

Moreover, the Commission cannot avoid its responsibility to determine the elements to be unbundled by purporting to delegate that task, in whole or in part, to the states. The statutory

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of the statutory and regulatory framework under which the [federal agency] pursues difficult (and often competing) objectives." *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 349 (2001); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (holding that state policies resulting in "serious interference with the achievement of the full purposes and objectives of Congress" are preempted) (internal quotation marks omitted).

95/ 47 U.S.C. § 251(d)(3)(C).

96/ *UNE Remand Order* ¶ 154 (emphasis added).

97/ For example, the Minnesota state commission recently opened a new proceeding to determine whether Qwest should be required to provide unbundled packet switching, notwithstanding the Commission's determination in the *UNE Remand Order* that such unbundling should not be required. Notice and Order for Hearing, *In re Commission Review and Investigation of Qwest's Unbundled Network Element Prices* and *Investigation into Qwest's Obligation to Unbundle its Network to Permit Line Sharing Over Fiber-Fed Loops*, Docket Nos. P-421/CI-01-1375, P-421/CI-02-293, at 3-4 (Minn. Pub. Utils. Comm'n Mar. 13, 2002).

language itself precludes the Commission from avoiding its Congressionally mandated duties and delegating to state commissions substantial responsibility for interpreting, or making policy judgments concerning, the "necessary and impair" standard. Section 251 "requires" *the Commission* — not individual state commissions — to "determin[e] what network elements should be made available," by applying that standard and perhaps other factors that it deems relevant to the Act's overall purposes.[98/] An open-ended delegation to state commissions would amount to an abdication of the Commission's responsibility to provide "substance to the 'necessary' and 'impair' requirements" and would leave it to chance that state commissions will do so.[99/] Congress did not intend that result; to the contrary, as noted above, Congress preserved state authority to impose access and interconnection obligations *only to the extent* those obligations are "consistent with" and "do[] not substantially prevent implementation of the requirements" of section 251.[100/]

Where, as here, Congress has expressly defined the limits of permissible delegation, an agency may not delegate beyond those limits. The Act includes various specific provisions authorizing delegation of the Commission's authority to other entities, including state bodies, and these authorize such delegation only with respect to particular, discrete subjects. These include, for example, numbering administration,[101/] universal service,[102/] and jurisdictional

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98/ 47 U.S.C. §251(d)(2); *Iowa Utils. Bd.*, 525 U.S. at 391-92.

99/ *Iowa Utils. Bd.*, 525 U.S. at 392.

100/ 47 U.S.C. § 251(d)(3).

101/ *Id.* § 251(e)(1).

102/ *Id.* § 254(a)(1).

separations of property and expenses between intrastate and interstate operations.[103] Given the Act's express enumeration of such targeted subjects of delegation, the Act must be understood to prohibit broader delegation to the states by the Commission in unrelated areas that are not similarly identified.[104]

Indeed, the Commission itself has recognized, in analogous circumstances, that it may not simply relinquish its regulatory responsibilities to the states in the absence of express congressional authorization to do so. For example, in *MTS and WATS Market Structure*, the FCC rejected suggestions that it delegate to state commissions the authority to formulate interstate access charge regimes, noting that "[t]his Commission has the responsibility to balance conflicting goals to the Communications Act in order to achieve results that will promote all of those goals to the maximum extent possible . . . [and] [t]he Act does not permit us to abdicate that responsibility to others."[105] Similarly, in its ONA rules, the FCC declined to delegate review authority over interstate tariffs to state commissions and expressed doubt that such delegation is authorized by the Communications Act.[106]

Likewise, here, the Act does not permit the Commission to delegate to the states the responsibility for making the legal and policy judgments necessary to determine what elements

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[103] *Id.* § 410(c).

[104] *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947); *United States v. Giordano*, 416 U.S. 505, 514 (1974); *Halverson v. Slater*, 129 F.3d 180, 185-86 (D.C. Cir. 1997) (applying "expressio unius est exclusio alterius" canon, which holds that "the mention of one thing implies the exclusion of another thing," to invalidate subdelegation that exceeded specifically limited grant of delegation authority) (internal quotation marks omitted).

[105] 97 F.C.C.2d 682, 762 ¶ 202 (1983).

[106] Memorandum Opinion and Order on Reconsideration, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 8 FCC Rcd 3114, 3118 ¶ 23 (1993).

should be unbundled. Permitting state commissions to supplement or determine the list of UNEs on a state-by-state basis according to their own standards would produce uncertainty and inconsistent results, and would inhibit the development of competitive, de-regulated telecommunications markets.

Still more problematic is AT&T's bizarre proposal to allow state commissions to prevent the *Commission*, in effect, from *removing* an unbundling requirement from the existing list. AT&T urges the Commission to "establish a process in which state regulatory commissions *take the lead* in determining when alternatives in their states are sufficiently available to warrant 'de-listing' a UNE."[107/] As an initial matter, this proposal is a telling about-face from AT&T's position in the *UNE Remand* proceeding, where AT&T led the opposition to an increased state role. There AT&T declared: "Any process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress."[108/]

AT&T's new proposal would create precisely the mischief that it rightly feared in the *UNE Remand Proceeding*. In particular, it would thwart the "flexibility" that Congress specifically gave to this Commission to balance the statutory objectives. Worse still, just like the proposals to let the states add (but not subtract) UNEs from the national list, it would skew the inquiry in favor of non-facilities-based competition. AT&T's proposal would effectively impose on ILECs the burden of having to convince individual state commissions to de-list a UNE even

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107/ AT&T Comments at 241 (emphasis added).

108/ Reply Comments of AT&T Corp., CC Docket No. 96-98, at 57-58 (filed June 10, 1999).

after this Commission had determined that the element no longer satisfies the "necessary and impair" standard. This would all but prevent the Commission from removing UNEs from the national list "as alternative facilities become more available and the market for telecommunications in general grows more competitive."[109/] Stripped of unilateral authority to reduce regulatory obligations in response to developments in the marketplace and according to the standards set forth in the Act (and as required by the D.C. Circuit's decision), the Commission would have to rely on the willingness of individual state commissions, in effect, to ratify the Commission's decisions and findings. It is difficult to imagine a regulatory approach more at odds with the national policy framework created by Congress, and the D.C. Circuit's recent decision.

II. THE COMMISSION SHOULD REMOVE CIRCUIT SWITCHING AND, IN MANY MARKETS, DEDICATED TRANSPORT FROM THE LIST OF REQUIRED UNES.

A. Circuit Switching

The record establishes that CLECs would not be impaired from providing any telecommunications services in *any* geographic markets without access to unbundled switching.[110/] As Qwest demonstrated in its comments, CLECs have deployed and are using their own switching facilities throughout the country. CLECs currently are using their own switches to serve customers in wire centers serving 86% of the Bell companies' access lines.[111/] The commenters in this proceeding have provided no basis for concluding that CLECs could not

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109/ *Notice* at 22802 ¶ 45.

110/ Qwest focuses in this section on *circuit* switching. As noted below, the Commission generally declined to require the unbundling of packet switching in the *UNE Remand Order*, and subsequent developments have only strengthened the rationale for that decision.

111/ *UNE Fact Report* at II-1, II-6.

use these same facilities to expand their services to other customers (such as mass-market retail customers) in those wire centers or to customers in other wire centers where CLEC switches have not yet been deployed. Indeed, the opposite is true. The *UNE Fact Report* explains that switch manufacturers have employed modular designs that make it easier and more cost-effective to expand the capacity of their switches,[112] and CLECs themselves report that they are able to use a single switch to serve large geographic areas spanning a whole LATA, a whole state, or even multiple states.[113] Moreover, the fact that CLECs have been able to deploy their own switching facilities in so many wire centers demonstrates that, even in markets where CLEC switches have not yet been deployed, CLECs would be more than capable of self-provisioning switches instead of relying on ILEC switching.[114] Thus, there is no basis for concluding that CLECs would be impaired from providing telecommunications services in *any* markets without access to unbundled ILEC switching at TELRIC prices.

The CLECs' attempts to discount the significance of the substantial CLEC switch deployments are unpersuasive. They argue that new entrants require access to the UNE-P (and thus to unbundled switching) in order to develop a sufficient customer base to justify deploying a switch in a particular market.[115] AT&T similarly contends that, because utilization of CLEC

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[112] *UNE Fact Report* at II-9.

[113] *Id.* at II-8.

[114] *See* Farrell Declaration ¶ 17 ("[T]he fact that one or more alternative suppliers are providing an element is itself strong evidence that entry barriers do not preclude efficient competitors from supplying the element in question.").

[115] *See, e.g.*, WorldCom Comments at 26 ("[U]ntil it builds a substantial customer base, a CLEC using its own switches and transport cannot achieve all of the scale economies the ILEC enjoys."); *id.* at 85 (arguing that CLECs require "a sufficient concentration of [high-volume] customers to justify deployment of a CLEC switch"); AT&T Comments at 207-08 (arguing that UNE-P is necessary because it allows AT&T to acquire business customers through UNE-P and then migrate those customers to AT&T switches in large quantities); General Communication

switches allegedly is below "an efficient usage level, . . . AT&T cannot achieve the same efficiencies as the ILECs when it uses its own switches."[116/] In effect, this argument amounts to little more than claiming that CLECs' costs per customer would be too high if they had to deploy a switch before winning a critical mass of customers. But, as discussed above and in Professor Farrell's declaration, this argument is unpersuasive and rightfully was rejected by the D.C. Circuit. Professor Farrell's declaration provides references to the economics literature that "describes how innovative firms in many industries can and do survive a period of being below [even] minimum efficient scale."[117/] Thus, the court correctly concluded that, even though "average unit costs are necessarily higher at the outset for *any* new entrant into virtually any business,"[118/] such cost disparities alone do not justify a finding of impairment.

Even if the CLECs' argument were not squarely foreclosed by the D.C. Circuit's opinion, CLECs still have not established as a factual matter that they would be unable to accumulate the volumes they supposedly need to compete. Moreover, they fail to take into account the fact that CLECs can lease switching capacity to each other. In other words, even if AT&T is right that some CLECs' own traffic does not fully utilize the capacity of their switches, such CLECs can lease that excess capacity to others, much as CLECs argue in cost dockets around the country that ILEC costs would be reduced if they shared their facilities with other utilities. Indeed, the availability of excess CLEC switching capacity, if true, only demonstrates that CLECs have an

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Comments at 38 ("Without UNEs, [a CLEC] would have . . . to make a huge capital investment upfront to build facilities without any assurance that it would eventually get the customers to sustain that investment.").

116/ AT&T Comments at 207.

117/ *See* Farrell Declaration ¶ 11.

118/ *USTA*, 290 F.3d at 427.

existing, alternative source of switching other than ILEC UNEs that they can use to provide service.

Moreover, if the desire to acquire a large enough customer base *before* deploying a switch were enough to justify maintaining switching as a UNE, then under the CLECs' analysis, switching would have to remain a UNE perpetually, because it will always be possible to identify (or at least hypothesize) a new entrant that lacks a large enough customer base in a particular market to justify the immediate investment in new switching facilities. But even if a particular new entrant does not have a sufficient initial customer base to justify deploying a switch, that does not justify requiring ILECs to provide UNE-P or unbundled switching. As noted in Part II-C above and recognized by the D.C. Circuit, the goal of the 1996 Act is to protect *competition*, not particular competitors.

In any event, new entrants have at least three alternatives to the UNE-P that provide meaningful opportunities to enter new markets without having to deploy a switch. For example, if other CLECs have deployed switches in a market, a new entrant could use that CLEC's excess switching capacity and purchase a UNE loop and dedicated transport or special access from the ILEC to connect the customer to the CLEC switch.[119/] Alternatively, the new entrant could offer resold ILEC services until it has obtained enough customers to justify the expense of deploying its own switch. Or the new entrant could combine ILEC switching, available at *market* (rather than TELRIC) prices, with unbundled loops to provide service. In each case, the CLEC would have a meaningful opportunity to compete and provide service without having to rely on unbundled ILEC switching.

[119/] The new entrant also may be able to purchase dedicated transport from a third party if dedicated transport is no longer required to be unbundled in the relevant market or the CLEC does not wish to purchase transport from the ILEC.

Finally, as noted above, CLEC complaints about thin profit margins for mass-market services do not justify a finding of impairment with respect to switching or the UNE-P. If regulators want to stimulate competition for residential customers in certain markets, they should rebalance rates and remove the barriers to entry posed by existing rate structures.

1. Hot Cuts

Because they cannot credibly dispute the overwhelming evidence of the ready availability of switching from sources other than ILECs, AT&T and other CLECs fall back to the argument that "hot cuts" pose operational impediments sufficient to satisfy the impair standard. But CLECs ignore the evidence that hot cut performance has improved considerably in the more than two years since the *UNE Remand Order* to a level foreclosing any argument that hot cuts pose an operational or other barrier to competition through use of UNE loops. As demonstrated in the *UNE Fact Report*, hot-cuts are now routinely completed on-time without significant disruptions more than 98% of the time.[120/] In particular, in each month since July of 2001, Qwest has performed at least 98% of its analog loop hot-cuts on time and at least 96% of its digital loop hot-cuts on time. Qwest also has studied the potential impact of increased hot-cut demand and determined that Qwest would be able to perform hot cuts in place of *all* incoming, mass market UNE-P orders to serve existing customers without any performance degradation. The CLECs have not provided any data demonstrating that problems with the hot-cut process impair their ability to serve customers using UNE loops with their own switches. And contrary to AT&T's claims, its purported preference for "managed" UNE loop conversions over individual hot cuts does not warrant a finding of impairment for switching.[121/] If AT&T desires managed

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120/ *UNE Fact Report* at II-16 to II-17, App. H.

121/ AT&T Comments at 221. Qwest is not aware of AT&T requesting any such managed conversions in its in-region service area.

conversion, it may resell ILEC services for the brief period prior to the connection of the loop to AT&T's switch as part of a managed conversion.

The Commission should reject the proposal of several commenters to condition any removal of unbundled switching from the list of required UNEs on the ILECs' implementation of some kind of automated process for provisioning UNE loops.[122/] As a preliminary matter, the development of a practicable automated process for provisioning loops is not within the control of the ILECs. The development of such a process would require the cooperation of ILECs, CLECs, and equipment vendors. Indeed, Telcordia has been soliciting funding from "all industry stakeholders" to develop industry standards (called "GR-303 Generic Requirements") and solve the security and other operational barriers that would permit automated local loop unbundling, although the process has been slow.[123/] Even after the necessary standards are developed, equipment manufacturers (whose recent financial difficulties have been well-documented) will have to invest the resources necessary to add this functionality to their products. More fundamentally, the data in the record demonstrate that the hot cut processes in use today are more than sufficient to warrant a finding that CLECs would not be impaired without forced access to unbundled switching.

Finally, there is no reason to believe that eliminating the requirement to provide unbundled switching would require carriers instantaneously to migrate all current UNE-P customers to CLEC switches using hot cuts, as some parties apparently fear. As noted above, CLECs serving those customers would have at least two options for continuing to provide

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122/ *See, e.g., id.* at 235-39; WorldCom Comments at 86.

123/ Telcordia Technologies, *GR-303 Integrated Access Platforms - 2001 Work Program Information* (visited July 17, 2002) <http://www.telcordia.com/resources/genericreq/gr303/program.html>.

service to their UNE-P customers for a transitional (or longer) period without requiring a hot-cut: ILEC switching obtained at market (rather than TELRIC) rates in combination with unbundled loops, or resold ILEC services. Either of these options would allow CLECs either to avoid hot cuts entirely or to migrate their UNE-P customers to CLEC switches at a more gradual pace.

2. Delays in Deployment

Contrary to the arguments made by some commenters, the possibility that CLECs may experience delays when deploying a switch does not justify a finding of impairment. The D.C. Circuit's ruling concerning cost disparities provides instructive guidance in this regard. Specifically, the court held that "to rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act's unbundling provisions."[124/] The same should be true of delays associated with constructing new facilities: new entrants in *any* industry must allow for a certain amount of planning lead time and construction time before new facilities become operational, just as new entrants in *any* industry face increased average costs until they achieve a certain scale of operations. The delays associated with deploying new switches could hardly be called an impairment, as evidenced by the approximately 1,300 known CLEC switches currently in service.[125/] Moreover, a finding of impairment based on the time it takes to deploy a new switch would almost certainly lead to a perpetual obligation to unbundle switching, and perhaps every other network element, as one could always identify (or hypothesize) a new entrant that does not yet have its own facilities in service.

124/ *USTA*, 290 F.3d at 427.

125/ *UNE Fact Report* at II-1.

B. Dedicated Transport

1. CLECs Are Not Impaired Without Access to Unbundled Transport in Markets That Satisfy the Commission's Pricing Flexibility Standard.

Qwest has proposed removing the requirement to unbundle dedicated transport facilities in markets that meet the Commission's test for pricing flexibility.[126] This proposal is consistent with the D.C. Circuit's mandate to eliminate unbundling requirements "where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have been the object of Congress's concern."[127] As the Commission noted in granting Qwest's recent application for pricing flexibility in 31 MSAs, the Commission's pricing flexibility rules are designed to give price cap LECs flexibility "as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives."[128] Under the Commission's rules, a LEC seeking Phase I relief must meet triggers designed to "show that competitors have made irreversible investments in the facilities needed to provide the services at issue, thus discouraging incumbent LECs from successfully pursuing exclusionary strategies."[129] The fact that

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[126] If the Commission eliminates the obligation to unbundle switching under section 251, the obligation to provide *shared* transport as a UNE should be eliminated as well since shared transport is relevant only to the extent that CLECs are obtaining unbundled switching from an ILEC. *See UNE Remand Order* at 3862 ¶ 369 n.731.

[127] *USTA*, 290 F.3d at 422.

[128] Memorandum Opinion and Order, *Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 02-01, DA 02-952, ¶ 3 (rel. Apr. 24, 2002) ("*Qwest Pricing Flexibility*").

[129] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, 14258 ¶ 69 (1999) ("*Pricing Flexibility Order*"). An ILEC seeking broader Phase II relief must meet even more stringent triggers designed to "demonstrate that competitors have established a significant market presence in the provision of the services at